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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CUTHBERT EMANUEL DUENAS,

Defendant and Appellant.

B288392

(Los Angeles County
Super. Ct. No. KA088870)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter A. Hernandez, Judge. Affirmed and remanded with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Over the course of more than 18 hours, defendant Cuthbert E. Duenas raped Veronica twice, beat her numerous times, and kidnapped her with the intent to rape her. On appeal, defendant does not challenge the convictions. He argues that his sentence must be modified because Penal Code¹ section 654 bars multiple punishments for his crimes. We conclude the record supports the trial court's implicit finding that defendant harbored separate objectives as that phrase is used for purposes of section 654. Because defendant harbored separate objectives, the trial court properly sentenced him to multiple punishments for the various crimes.

Defendant additionally requests this court retroactively apply section 1001.36, effective June 27, 2018 and amended effective January 1, 2019. His crimes occurred in 2009, long before this statute was enacted. Our Supreme Court has granted review to determine whether section 1001.36 applies retroactively. (*People v. Frahs* (2018) 27 Cal.App.5th 784, review granted December 27, 2018, S252220.)

We need not decide whether the statute is retroactive because having committed rape, defendant is not eligible for the mental diversion program under the statute even if it were to apply to him retroactively. We reject defendant's argument that applying the current statute to him violates the ex post facto law; defendant was subject to the same punishment when he committed his offenses as under the current statute.

Finally, the parties agree that the case must be remanded for the trial court to recalculate defendant's custody credits. We affirm and remand with directions.

¹ All statutory citations are to the Penal Code.

FACTUAL BACKGROUND

We summarize only those facts relevant to the issues defendant raises on appeal.

Veronica met defendant in the beginning of November 2009. On November 28, 2009, Veronica and defendant arranged to meet at a restaurant. When they arrived at the restaurant, at approximately 7:00 p.m., they decided to proceed to Universal Studios in defendant's car. Veronica left her car at the restaurant.

1. Defendant Rapes Veronica in a Parking Lot

When they arrived at Universal Studios, defendant parked his car and moved from the driver seat to the back seat of the car. Defendant pulled Veronica through the console to the back seat of the car. Defendant held Veronica and pulled down her pants, using force. Veronica pushed defendant and told him that she did not want to have sex with him. Defendant inserted his penis in Veronica's vagina against her will.

2. Defendant and Veronica Visit Universal Studios

Veronica chose to forgive defendant and continue with their visit to Universal Studios. As they left Universal Studios, defendant warned Veronica not to scream, not to do anything, and to look only at him. Defendant warned Veronica that he could kill her if she "[did] something."

3. Defendant Attempts To Take Veronica to a Motel

Veronica and defendant returned to defendant's car in the Universal Studio's parking lot. Veronica understood that defendant would drive her back to the restaurant where her car was located. Instead, defendant drove Veronica to a motel and

told her he wanted to spend the night with her. Veronica refused but defendant ignored her, parking at the Valley Motel.

Veronica walked away from the motel and hailed a taxi. Defendant followed her into the taxi. The taxi driver drove Veronica and defendant to Veronica's car. When they arrived at Veronica's car, it was approximately 2:00 a.m. or 3:00 a.m.

4. Veronica Drives Defendant to the Valley Motel and Defendant Assaults Her

Defendant asked Veronica to drive him back to his car, and Veronica agreed. When they arrived at the motel, defendant refused to exit Veronica's car. When he finally exited, defendant ran around the car, opened the driver's door, and grabbed Veronica. Defendant hit Veronica's face and pulled her hair. Defendant used his fists to hit Veronica. Veronica yelled for help, but no one assisted her. Defendant told the bystanders that Veronica was drunk.

5. Defendant Kidnaps and Repeatedly Assaults Veronica

Defendant dragged Veronica into his car. Once inside, he beat her. Veronica tried to open the door to get out, but defendant accelerated and drove away. Defendant grabbed Veronica's hair and pounded her face into the console, causing her nose to bleed. Veronica cried as defendant drove her.

Defendant stopped to purchase gas, but when he observed Veronica try to exit the car, he returned to the car and drove away from the gas station. Veronica tried to jump out of the car, and the door to the car slammed on her leg. Veronica's right foot dangled outside the door, and she lost all feeling in it. She felt severe pain in her knee. Veronica asked defendant to drive her to

the hospital, but he refused, stating that he “would get into trouble.” Veronica cried, and defendant said “That’s good. That’s what you deserve.”

6. Defendant Takes Veronica to His Apartment

Defendant drove Veronica to his apartment. Prior to arriving at his apartment, defendant used a tire iron to loosen the passenger door of his car to permit Veronica to remove her foot. Veronica’s entire body hurt from the beatings. She had no feeling in her leg.

Once at his apartment, defendant dragged Veronica up the stairs. Defendant took Veronica into his room and “threw” her on his mattress.

Defendant changed his clothes. Defendant threatened to beat Veronica if she failed to remain quiet. He threatened her a second time, warning her not to say anything to anyone inside the apartment. Veronica repeatedly requested defendant take her to the hospital, and each time defendant refused.

Veronica asked Delores T., who lived in the same apartment as defendant to call the police. Veronica did not say the words aloud but “mouth[ed]” them. Defendant threatened to kill Delores if she called the police. Delores heard Veronica scream and heard Veronica say that defendant was “hurting” her. Delores observed that Veronica’s foot appeared broken, a patch of hair was missing, and her eye was bruised. Delores called the police after defendant and Veronica left the apartment.

7. Defendant Drives Veronica to the Lincoln Motel and Rapes Her

After visiting his apartment, defendant pulled Veronica to his car and threatened her if she screamed. Defendant drove

Veronica to the Lincoln Motel. Defendant and Veronica were at the Lincoln Motel from 6:30 a.m. to 11:00 a.m. on November 29, 2009. Veronica was in pain and her knee was swollen. She was no longer able to talk.

Veronica could not stand, and defendant carried Veronica into a motel room. He placed her on a bed. Defendant told Veronica he would not take her to the hospital; instead he would “treat” her.

Defendant removed Veronica’s shoes and pants, using force. Defendant resisted Veronica’s efforts to push him away. Defendant forcefully separated Veronica’s legs. Defendant inserted his penis in her vagina.²

After raping Veronica, defendant carried her from the motel room and placed her in his car. Veronica felt faint. Defendant drove to a junkyard to look for a new door to his car. A worker in the junkyard called the police.

Police arrived at approximately 1:30 p.m. on November 29, 2009. This was more than 10 hours after defendant forced Veronica in his car and more than 18 hours after they commenced their evening together. Veronica told the police that she was afraid that defendant might kill her.

8. Veronica Suffers Numerous Injuries

An emergency room physician observed that Veronica had bruises and bite marks. She had bald patches on her head and bleeding from one eye. Her cheek bone was tender. Her right knee and ankle were swollen. Her right femur bone and right

² Veronica testified that defendant inserted his finger in her vagina. Jurors found defendant not guilty of sexual penetration by a foreign object.

ankle bone were fractured. Metatarsal bones on Veronica's left foot were fractured. Veronica required surgery on one knee.

Subsequent tests showed that defendant's sperm was in Veronica's vagina.

PROCEDURAL BACKGROUND

In an amended information, defendant was charged with two counts of forcible rape, kidnapping to commit rape, assault by means likely to produce great bodily injury, and sexual penetration by a foreign object. With respect to the kidnapping and the assault, the People alleged that defendant inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The People further alleged that defendant suffered a prior conviction within the meaning of section 667.5.

Defendant pled not guilty and not guilty by reason of insanity. The trial court twice found defendant not competent to stand trial and twice suspended the criminal proceedings. As a result, defendant spent substantial time before trial at Patton State Hospital.

At trial, defendant did not testify. Two witnesses testified in his defense, and both testified that defendant suffered from schizoaffective disorder. During closing argument, defense counsel admitted that defendant kidnapped Veronica and assaulted her causing great bodily injury.

The prosecutor argued the first rape occurred in the parking lot at Universal Studios. The second count of rape occurred at the Lincoln Motel. With respect to the kidnapping, the prosecutor argued that defendant moved Veronica multiple places. He could have raped her in the car without moving her. The prosecutor argued that the kidnapping started at the Valley Motel when defendant forced Veronica into his car. "[A]t

that point . . . she was no longer consenting to go with him, and he was taking her by force.”

With respect to the assault, the prosecutor argued that defendant punched Veronica, pulled her hair, and drove the car in a manner that the door slammed on her legs. The prosecutor argued that the jurors had to unanimously agree on which act constituted the assault. The prosecutor reiterated that after defendant forced Veronica into his car, he punched her head and pulled her hair.

Jurors convicted defendant of all counts except sexual penetration by a foreign object. Jurors found the great bodily injury enhancements true. Defendant admitted the prior offense.

In the second portion of the jury trial, jurors heard testimony concerning whether defendant was sane at the time he committed the offenses. Jurors found that defendant was sane at the time of the offenses. Defendant does not challenge this finding on appeal.

The trial court sentenced defendant to the upper term of eight years for each count of rape. The court found the two rapes occurred on separate occasions. The court ordered the sentences to run consecutively. The court added a consecutive one year determinate term for the assault. The court added three years for one great bodily injury enhancement and stayed the second great bodily injury enhancement. The court added one year for the section 667.5 prior prison term. The total determinate term was 21 years. Subsequently, the court reduced the sentence to 18 years after it received a letter from the Department of Corrections indicating that the three-year sentence for the great bodily injury enhancement was erroneous.

With respect to the kidnapping to commit rape charge, the trial court sentenced defendant to a consecutive indeterminate term of life. Defendant timely appealed.

DISCUSSION

A. Defendant Demonstrates No Error Under Section 654

Defendant argues that his sentence for the second rape and for the assault must be stayed pursuant to section 654.³ That statute provides in relevant part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) “Section 654 precludes multiple punishments for a single act or indivisible course of conduct.” (*People v. Hester* (2000) 22 Cal.4th 290, 294.) “‘[T]he purpose of section 654 ‘is to insure that a defendant’s punishment will be commensurate with his culpability.’ ” (*People v. Capistrano* (2014) 59 Cal.4th 830, 886, disapproved on another ground by *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

“Under section 654, ‘a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]’ [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one.”

³ The failure to object in the trial court does not forfeit the issue on appeal. (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.)

(*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) *People v. Hicks* (2017) 17 Cal.App.5th 496 recently reaffirmed this principle.

“Whether a defendant harbored a separate intent and objective for each offense is a factual determination for the trial court, and its conclusion will be sustained on appeal if supported by substantial evidence. [Citation.] On review of this issue, we consider the evidence in the light most favorable to the judgment.” (*People v. Hicks, supra*, 17 Cal.App.5th at pp. 514–515.) “‘A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.’” (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1336–1337.)⁴

1. Section 654 does not bar multiple punishment for aggravated kidnapping and rape

The offenses of kidnapping Veronica at the Valley Motel and raping her at the Lincoln Motel were “temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one.” (*People v. Gaio, supra*, 81 Cal.App.4th at p. 935.) After forcing

⁴ Barring circumstances foreclosing the trial court from considering all the evidence, “a trial court may base its decision under section 654 on *any* of the facts that are in evidence at trial, without regard to the verdicts.” (*People v. McCoy, supra*, 208 Cal.App.4th at p. 1340.) A trial court may even rely on evidence excluded from trial. (*People v. Racy, supra*, 148 Cal.App.4th at p. 1337.) However, the manner the case is charged and tried may bar the trial court from considering all the evidence. (*People v. Roberson* (1988) 198 Cal.App.3d 860, 870–871.) Defendant identifies no evidence the trial court was precluded from considering.

Veronica into his car, defendant then drove Veronica to his apartment, carried her up the stairs, and threw her on the mattress. Defendant spent enough time in his apartment to change his clothing, threaten Delores, and drag Veronica back to his car. Then he drove her from his apartment to the Lincoln Motel. Defendant did not check into the Lincoln Motel until 6:30 a.m., more than three hours after he kidnapped her. Moreover, defendant's threats to Veronica and to Delores support the fact that he renewed his intent to rape her; he threatened Veronica and Delores to make sure he could effectuate his intent to rape Veronica even though she was badly injured. Defendant then renewed his intent when he drove Veronica to the Lincoln Motel instead of driving her to the hospital as she repeatedly requested. In short, the record supported the trial court's implicit conclusion that defendant harbored separate intents for the kidnapping and the rape. (See *People v. Clair* (2011) 197 Cal.App.4th 949, 960 [sending e-mails 10 and 20 minutes apart allowed the defendant an opportunity to reflect and renew his intent to commit another crime].)

Contrary to defendant's argument, *People v. Latimer* (1993) 5 Cal.4th 1203, 1211 (*Latimer*) does not compel a different result. In *Latimer*, the defendant kidnapped his victim, drove her to the desert and then raped her. (*Id.* at p. 1206.) Defendant then drove the victim another 50 to 75 yards into the desert and raped her again. (*Ibid.*) Defendant then drove another 30 to 75 yards, stopped the car, and the victim ran into the desert. (*Ibid.*) Under those circumstances, the court held that section 654 barred multiple punishment. (*Id.* at p. 1216.) The court, however, explained that under section 654, "similar but *consecutive* objectives" may permit "multiple punishment." (*Id.* at p. 1212.)

The defendant in *Latimer* kidnapped the victim and raped her shortly thereafter. He moved her only a short distance, measured in yards, between rapes. The defendant in *Latimer* did not make multiple stops affording him the opportunity to reflect and renew his intent. In contrast here, as the trial court implicitly found, defendant renewed his intent as he drove Veronica around for hours to different buildings and locations.

2. Section 654 does not bar multiple punishment for aggravated kidnapping and assault

Defendant's argument that section 654 bars multiple punishment for kidnapping with intent to rape and assault ignores the proper standard of review. "A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence." (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

For purposes of section 654, the issue is whether defendant harbored a separate intent and objective for each offense. (*People v. Hicks, supra*, 17 Cal.App.5th at pp. 514–515.) Substantial evidence supported the trial court's conclusion that he did. Defendant assaulted Veronica at the Valley Motel, pulling her hair and punching her in the face. This occurred prior to the kidnapping. After forcing Veronica into his car, defendant pounded her face into the console. By the time, they reached defendant's apartment, a patch of Veronica's hair was missing, and her eye was bruised. As a result of defendant's beatings, Veronica suffered bruises and bite marks. She had bald patches on her head and bleeding from one eye. Her cheek bone was tender. Additionally, defendant accelerated the vehicle,

causing the car door to slam on Veronica's leg and injuring it severely.

Although the record does not show which assault jurors relied upon in convicting defendant, the record supported the trial court's implicit conclusion that each was based on an intent to harm her. Defendant even celebrated when Veronica cried from pain stating, "That's good. That's what you deserve." Defendant's intent to harm Veronica was separate and distinct from his intent to rape her. The movement leading to the kidnapping conviction was an act separate from the assaults.

Defendant emphasizes that the kidnapping continued during the time period most of the assaults occurred. However, he fails to demonstrate this is the inquiry relevant to a section 654 analysis. We are not called upon to determine whether the assault occurred while the kidnapping was in progress. Instead, the dispositive issue concerns defendant's intent. Even if the assaults were contemporaneous to the kidnapping, defendant could have kidnapped Veronica with the intent to rape her without the intent to assault and harm her by punching her face, ripping out her hair, or breaking her leg and foot. The record amply supported the trial court's implicit conclusion that defendant harbored a separate intent when he assaulted Veronica.

B. Defendant Is Not Entitled To Diversion Under Section 1001.36

Effective June 27, 2018, the Legislature enacted section 1001.36, which authorizes pretrial diversion for qualifying defendants with mental health disorders. Section 1001.36 defines " 'pretrial diversion' [as] the postponement of prosecution, either temporarily or permanently, at any point in the judicial

process from the point at which the accused is charged until adjudication.” (§ 1001.36, subd. (c).)

The Legislature amended the statute effective January 1, 2019 to limit the eligibility for diversions. Persons who commit rape in addition to other crimes are no longer eligible. Because defendant committed rape, he is not eligible for diversion even if section 1001.36 would apply retroactively, an issue we do not have to decide.

Defendant argues that under the ex post facto law, this court should apply section 1001.36 as it existed between June 27, 2018 and January 1, 2019. Both the California and federal Constitutions prohibit the enactment of ex post facto laws. (Cal. Const., art. I, § 9; U.S. Const., art. I, §§ 9, 10.) “A statute violates the prohibition against ex post facto laws if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed.” (*People v. White* (2017) 2 Cal.5th 349, 360.)

The ex post facto laws do not apply here because defendant committed his crimes in 2009, before the diversion program existed. He thus could not have relied on the prospect of pretrial diversion when he committed his offenses. The new law, moreover, does not punish an act that was innocent or increase the punishment for a crime after it was committed. As *People v. Cawkwell* (2019) 34 Cal.App.5th 1048 held under nearly identical circumstances, there is no ex post facto violation because defendant “was subject to the same punishment when he committed his offenses as he was after the Legislature narrowed the scope of defendants eligible for diversion.” (*Id.* at p. 1054.)

To the extent defendant is arguing that this court is required to apply *former* section 1001.36 as it existed June 27,

2018, he offers no legal theory or legal authority to support that argument. Although defendant demonstrates that courts regularly apply *current* statutes retroactively when those statutes mitigate punishments, he cites no authority supporting his claim that the same rule applies to *former* statutes. The rationale for applying current statutes retroactively is that the Legislature has determined the offense no longer merits the greater punishment. (*In re Estrada* (1965) 63 Cal.2d 740, 744–746; *People v. Frahs*, *supra*, 27 Cal.App.5th at pp. 790–791.) That rationale does not apply here because the Legislature has made clear that the statute does not apply to persons who, like defendant, commit rape.

C. Custody Credits

The parties agree that the case must be remanded for the trial court to recalculate defendant’s custody credits in light of the pretrial time defendant spent in a state mental health facility while he was being evaluated for competency to stand trial. As the parties agree, upon remand, the trial court should determine whether defendant was entitled to credit for the time he spent at Patton State Hospital (*People v. Bryant* (2009) 174 Cal.App.4th 175, 177, 182–183) and the time he spent in jail (§ 4019).

DISPOSITION

The judgment of conviction is affirmed. The case is remanded for the trial court to recalculate defendant's custody credits. If the trial court revises defendant's custody credits, it shall amend the abstract of judgment and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.